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No. 91-1217

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

FRATERNAL ORDER OF POLICE, LODGE NO. 5,
Petitioner,

v.

CITY OF PHILADELPHIA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, THOMAS FREEMAN, JR.; MICHAEL E. JORDAN; RODNEY LADSON; THE GUARDIAN CIVIC LEAGUE, INC.

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PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

Has the Third Circuit violated this Court's *City of Richmond v. J.A. Croson Co.* ruling by approving a consent decree which:

(a) Imposes a racial hiring quota without adequate proof of discrimination;

(b) Imposes a racial hiring quota despite proof that the challenged practice furthers the employer's legitimate goals, and;

(c) Imposes a racial hiring quota which is not narrowly tailored?

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COUNTERSTATEMENT OF THE CASE

This is a case to halt the use of a written entrance exam by the Philadelphia Police Department for selecting police officers on the grounds that it discriminates against African-American applicants. The original parties, based on extensive prior litigation involving similar tests, agreed to the consent decree set forth in Appendix C to the Petition.

On September 12, 1990 the District Court held an evidentiary hearing on the fairness and legality of the

consent decree. Evidence was presented by the proponents of the decree which included testimony by a statistician on the results of two exams administered by the defendants, by the Philadelphia Police Commissioner, and by the City Personnel Department's head of testing. Petitioners, intervenors below, presented no evidence concerning the tests.

The district court's opinion with its findings of fact and conclusions of law was entered October 16, 1990. It found significant racial disparities in the selection rates of the test (Appendix to the Petition 9a-11a (hereinafter "Appendix"), found no evidence that the test measured performance was presented (Appendix 11a-12a) and found the City's decision not to litigate the validity of the test was made in good faith and was reasonable (Appendix 15a-17a). The court found the decree minimized any impact on non-African-American applicants and was appropriately limited to remedy the unlawful disparities (Appendix 19a-21a). It concluded that the consent decree was fair, reasonable and in compliance with the law.

After issuing its opinion the court provided the intervenor with an additional three months to file briefs on reconsideration. The order was re-affirmed on April 16, 1991. After briefs and oral argument the Court of Appeals for the Third Circuit affirmed *per curiam* (Appendix 1a-2a).

SUMMARY

The premise of the questions presented for review are factually untrue: (1) there was uncontested proof of discrimination by the written tests; (2) there was no proof that the examinations further the employer's legitimate hiring goals of measuring applicants' ability to perform as police officers; and (3) the remedy is narrowly tailored to redress the discrimination in the tests and automatically ends when the discrimination ceases.

REASONS FOR DENYING A WRIT OF CERTIORARI

I. There was abundant and uncontested proof of discrimination by the Philadelphia Police Department's entrance examination.

The plaintiffs introduced evidence through a statistician, and the District Court found (Appendix 10a), that the disparity in pass rates between African-American and White test takers was statistically significant. The uncontradicted testimony was that on the two tests (December 1989 and June 1990) the failure rate for African-Americans was four times higher than for White test takers (21.1 percent versus 5.6 percent) and that this disparity was 15.7 standard deviations from the expected and that the probability that this was due to chance is less than one in ten thousand.

Petitioner's statement that "Under the Uniform Guidelines, . . . there was simply no discriminatory impact" is entirely wrong. The Guidelines, quoted at page 4 of the Petition, does not limit finding discrimination to when the minority selection rate is less than 80% of the white rate, as Petitioner asserts, but also provides:

> "Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms. . . ."

As noted, the Court found the disparity was significant in statistical terms, and it was uncontested that it was significant in practical terms since it foreclosed large numbers of black candidates from becoming police officers.

The District Court also found that using the test to establish a rank order increased the disparity to the point where only 11.5% of the top 200 persons on the combined eligibility list were African-American while they were a majority of the persons and were 65 percent of the bottom group of scorers. (Appendix 11a).

The Uniform Guidelines provides:

> "If a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis . . . the user should have sufficient evidence of validity and utility to support the use on a ranking basis." 28 C.F.R. §50.14(5)(G).

II. The Court found that the City's written examination did not predict whether an applicant would be a capable police officer.

The evidence was uncontested that the City had not conducted any studies which could validate the ability of the examination to predict an applicant's performance as a police officer and that the City did not believe such studies could be made. The Court found that this was a reasonable and good faith judgment on the basis of (a) extensive past experience by the City in litigation related to similar tests, (b) the Justice Department's successful litigation against the use of similar tests by Nassau County, New York and Suffolk County, New York, and (c) because the original developer of this test (Educational Testing Services of Princeton) had informed the City it was no longer marketing the test and was not available to help defend it.

Petitioner suggests that the examination did not have to successfully test for performance as a police officer but only for performance in the five (5) month academy training class. This is erroneous.

First, no evidence was presented to show the examination successfully predicts performance in the academy. The fact that virtually everyone who passes the test succeeds in the academy does not show whether it is under-inclusive by wrongfully rejecting persons who could also succeed. Furthermore, as the trial court noted (Appendix 11a-12a) the Police Commissioner testified that a study of previous exam takers showed that there was no correlation between the rank-order performance and performance at the Police Academy. Once they were

in the Academy, there was no difference in terms of performance there that you could relate to their position on the applicant list.

Secondly, and most importantly, the correct standard is performance as a police officer. The Academy is a temporary position (five (5) months) and the exam is for the purpose of hiring police officers. The Uniform Guidelines 28 C.F.R. §50.14(5)(I) are very clear on this point:

> "If job progression structures are to establish that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level."

III. The remedy is narrowly tailored to cure the discrimination found.

The remedy objected to addresses only the disparity in the examination selection rates. As long as the exam produces a racial disparity *and* the exam is not shown to be a valid predictor of performance, the disparity is eliminated. That is the only thing the consent decree does. Although the formula in the decree is awkward, its effect is to make the selection rate for African-American candidates and White candidates the same. The selection rate is set by whatever the pass rate is for White candidates.

As soon as the City uses an exam which eliminates the disparity or uses an exam which is a valid predictor of performance, the remedy is itself eliminated. This comports with all case law which requires the remedy to be narrowly directed to the discrimination found.

There is no issue presented here of affirmative action or remedies for persons not directly affected by the discriminatory action, which was the concern in *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706 (1989).

Conversely, the harm to White applicants is minimized because the Consent Decree postpones or delays their hiring but does not require them to be permanently passed over. *United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053 (1987).

CONCLUSION

For the foregoing reasons the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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